(5) No. 94-167

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Katia Martinez, Eduardo Martinez Puccini, and Henny Martinez de Papaiani,

Petitioners,

v.

Dirk A. Lamagno, The Drug Enforcement Administration, and the United States of America,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' BRIEF ON THE MERITS

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December 13, 1994

PETITION FOR CERTIORARI FILED JULY 25, 1994
CERTIORARI GRANTED NOVEMBER 14, 1994

60 pp

QUESTION PRESENTED

I. MUST THE DISTRICT COURT CONDUCT DE NOVO REVIEW OF THE ATTORNEY GENERAL'S CERTIFICATION ISSUED UNDER 28 U.S.C. § 2679(d), WHEN FACTS AND INDIVIDUAL FACTORS RAISE NUMEROUS QUESTIONS OF THE CORRECTNESS AND IMPARTIALITY OF THE DETERMINATION OF THE EXECUTIVE OFFICER, AS TO WHETHER ITS EMPLOYEE'S CONDUCT WAS "ACTUATED," AT LEAST IN PART, BY A PURPOSE TO SERVE THE UNITED STATES AT THE TIME OF THE INCIDENT OUT OF WHICH THE CLAIM AROSE?"

LIST OF PARTIES

The parties that have appeared here include all those listed on the case caption.

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No. 94-167

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

KATIA GUTIERREZ DE MARTINEZ, EDUARDO MARTINEZ PUCCINI, AND HENNY MARTINEZ DE PAPAIANI,

Petitioners,

v.

DIRK A. LAMAGNO, THE DRUG ENFORCEMENT ADMINISTRATION, AND THE UNITED STATES OF AMERICA,

Respondents.

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OPINIONS BELOW

The opinion of the United States Court of Appeal for the Fourth Circuit is unpublished (see Petitioners Appendix, hereinafter "App." 1-b; Joint Appendix, hereinafter "JA"-10), but the

decision is noted at 23 F.3d 402 (Table). The judgment of the United States District Court for the Eastern District of Virginia (App. 1-a; JA-9) is unreported.

STATEMENT OF JURISDICTION

As a result of injuries and loss of property due to an automobile accident occurring on January 18, 1991, a timely administrative claim was filed on May 5, 1991. Subsequently, within both the State of Virginia and the Federal two year statute of limitation period, a complaint was filed on January 15, 1993. On May 4, 1993, a Notice of Appeal was filed appealing the final order of the District Court of April 16, 1993. The judgment of the Court of Appeals affirming the order of the District Court was entered on April 28, 1994. This Court

has jurisdiction under 28 U.S.C. 1254-(1). The petition for writ of certiorari was filed on July 25, 1994, and granted on November 14, 1994.

STATUTE INVOLVED

28 U.S.C. § 2679
Exclusiveness of remedy

(d)(1) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such

action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. . . .

STATEMENT OF THE CASE

Petitioners Mrs. Katia Gutierrez de Martinez, Eduardo Martinez Puccini, and Henny Martinez de Papaiani, (hereinafter "Injured Parties"), are citizens of the Republic of Colombia, who on January 15, 1993, filed in the United States District Court for the Eastern District of Virginia, a Complaint based on diversity of citizenship, against respondent Dirk

A. Lamagno, (hereinafter "Mr. Lamagno"), a Special Agent employed by The Drug Enforcement Administration (DEA), for damages as a result of personal injuries and loss of property, due to an automobile accident occurring in Barranquilla, Colombia, on a Friday night, at 11:45 p.m. on January 18, 1991.[1]

Thus the only issue now before the Court is whether, under the Federal Tort Claims Act, the Attorney General of the United States by certifying to the district court, pursuant to 28 U.S.C. § 2679(d) (1), that a defendant federal employee was acting within the scope of

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[1]The Complaint originally included Counts against the DEA, and the United States, pursuant to the "headquarters exception" to 28 U.S.C. § 2680(k). In addition, judicial enforcement of the right to compensation under 21 U.S.C. § 904, was sought. These Counts were also dismissed by the lower courts. Of the two issues, only the question under 21 U.S.C. § 904, was raised in the Petition for Certiorari, however, the Court did not grant an order to review this second issue.

his federal employment at the time of his allegedly tortious conduct, the United States may insulate the federal employee from all liability, without any independent judicial inquiry in the propriety of the Attorney General's certification.

The Fourth Circuit held that such absolute immunity was required by statute, irrespective of the fact that: (1) Mr. Lamagno works for the Attorney General; (2) the Injured Parties came forward with specific facts, unrebutted by the Government, that demonstrate that the Attorney General's certification was not based on facts and was incorrect; and, (3) the Attorney General certification precluded recovery for the Injured Parties' personal injuries and loss of

property, because of the "foreign country" exception, 28 U.S.C. § 2680(k).[2]

In summary the Injured Parties charged that Mr. Lamagno, negligently caused the accident while driving away from his hotel under the influence of alcohol, late at night after normal working hours, in the company of an unidentified female passenger who was not a federal employee, and in a vehicle identified by non-diplomatic license plates No. LK 9264. (1 Record, Complaint, First Count ¶ 1, ¶ 3 and ¶ 9; 18 Record Transcript of hearing of April 16, 1993, p. 5, line 23; Appellants'

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[2]Although the court of appeals was correct in noting in their opinion that the Injured Parties "may yet receive redress for their injuries," (JA-20), because of their still valid administrative claim filed against DEA pursuant to 21 U.S.C. § 904, the reality is that the Justice Department has for over three and a half years been "sandbagging" this claim since filed on May 5, 1991.

Brief to Fourth Circuit, p. 16, note 5; Joint Appendix to Fourth Circuit A-59)

Furthermore, because of Mr. Lamagno's DWI condition while driving away from his hotel at a high rate of speed he failed to stop at a marked intersection. His armored truck did hit and totally demolished the Injured Parties car. Mr. Lamagno left the Injured Parties trapped in their car for over 45 minutes, unattended and bleeding with numerous physical injuries. (1 Record, Complaint, First Count ¶ 5 and ¶ 16; Second Count ¶ 2; and Third Count ¶ 2)

At the accident Mr. Lamagno, was ordered by the police to appear at a judicial hearing to be held by the 6th Criminal Court on January 19, 1991, and March 7, 1991, and provide testimony re-

garding the accident. (1 Record, Complaint, First Count ¶ 10 and ¶ 15)

However, instead of assuring Mr. Lamagno's appearance at the judicial hearing, officials of the DEA removed the non-diplomatic license plates No. LK 9264, and replaced them with diplomatic license plates No. CD0172. 1 Record, Complaint, First Count ¶ 11; and then instructed Mr. Lamagno not to appear at either of the ordered judicial hearings, and assisting Mr. Lamagno's fleeing of the Republic of Colombia on or about January 19, 1991. (1 Record, Complaint, First Count ¶ 13)

Thus Mr. Lamagno was accused of "careless, reckless, and grossly negligent operation of the motor vehicle." (1 Record, Complaint, First Count ¶ 16)

In response to the Complaint, on March 4, 1993, the United States Attorney issued a Certificate of Scope of Employment under 28 U.S.C. § 2679(d)(1), which only stated the following,

> I, ... , hereby certify that I have investigated the circumstances of the incident upon which the plaintiff's claims were based. On the basis of the information now available with respect to the allegations of the complaint, I hereby certify that defendant Dirk A. Lamagno was acting within scope of his employment as an employee of the United States of America at the time of the incident giving rise to the above entitled action. (JA-1)

The United States' moved to substitute itself for Mr. Lamagno. (JA-3).

The following day, March 5, 1993, based on the above one-paragraph certification of scope of employment, that was the only statement made by the United States, which neither stated any factual basis for its issuance, nor denied nor

rebutted the Injured Parties facts, the District Court entered an ex parte order substituting the United States for Mr. Lamagno (JA-7).

Subsequently, the United States filed a motion under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The United States stated that recovery was not available due to the "foreign country" exception, despite Mr. Lamagno's driving after normal work hours, away from his hotel, under the influence of alcohol, in the company of an unknown female, intentionally failing to appear at two judicial ordered hearings; and, being charged with violations of the Colombian Traffic Code. (9 and 10 Record, Motion of United States to Dismiss. See also Brief of Appellees, 4th Cir. Ct App., pp. 4 and 16)

At a hearing on the United States motion, on April 16, 1993, despite the Injured Parties counsel's argument that,

> ". . .the Government raises what I classify as a James Bond defense: Mr. Lamagno, acting under the influence of alcohol, after hours, and in the company of a woman, was in the scope of his employment. Which [for] James Bond may be good in movies, . . . is not good when it causes severe accidents such as this." (18 Record, Transcript of Hearing p. 5);

the District Court dismissed the action against the United States, based on the "foreign country exemption" under 28 U.S.C. § 2680(k), wherein the United States cannot be subject to suit for any tort committed outside of the United States (JA-9).

In the brief on appeal the Government continued to maintain that the "James Bond Defense" warranted the sub-

stitution of the United States for its DEA agent, since he is on,

> "duty twenty four hours a day. A Special Agent does not follow a normal civilian lifestyle while on special assignment in a foreign country." (Brief of Appellees, 4th Cir. Ct App., p. 19)

Despite the undisputed facts surrounding the accident, and the absurdity of the "James Bond Defense", on April 28, 1994, the Fourth Circuit affirmed the District Court's holding on all counts, stating that there is no discretion given to the district court to review the Attorney General's certification. (JA-19).

Because of the Fourth Circuit's absolute immunity holding, which is at odds with the rulings of eight other courts of appeals, and cannot be squired with either the specific wording of 28 U.S.C. § 2679(d)(1)(2) and (3), or the

Congressional intent which becomes apparent from reviewing the legislative history, a Petition for Certiorari was filed seeking review by this Court of the Fourth Circuits holding. Said Petition for review was joined by the Solicitor General.

SUMMARY OF THE ARGUMENT

In their Certification of Scope of Employment, neither the Attorney General nor any of her subordinates explained the basis of their certification decision, nor did they rebut, or even acknowledge, any of the proofs presented by the Injured Parties.

By establishing that Mr. Lamagno was driving away from his hotel under the influence of alcohol, late at night after normal working hours, in the company of an unidentified female passenger who was not a federal employee, and in a vehicle identified by non-diplomatic license plates No. LK 9264, the Injured Parties met their burden of proof that Mr. Lamagno was not acting within the scope of his federal employment at the time of the accident.

Thus in holding that the Attorney General's certification under the 28 U.S.C. 2679(d), conclusively requires that the United States be substituted for the government employee as the defendant in all civil actions, and is not subject to de novo judicial review, the Court of Appeals for the Fourth Circuit, is in error not only because of their accepting the absurdity of the Government's "James Bond Defense," but also because their decision is not in accord with either the Federal Drivers Act, or the Westfall Act.

Other circuit courts, in a more reasoned approach than the Fourth Circuit's grant of absolute immunity to federal employees, stress the statutory construction of 28 U.S.C. § 2679(d)(1) vis-a-vis § 2679(d)(2), and place empha

sis on the legislative history of the Westfall Act, to conclude that with exception of the denying the right to review the removal from a State court, the procedure established under the Federal Drivers Act which permitted the District Court to consider facts and circumstances which refute the certification of scope of employment remained unamended.

Accordingly because of the need to protect the public interest by assuring that public funds are not utilized to insure the actions of a federal employee committing tortious conduct while not within the scope of his or her federal employment, independent judicial review is required. This is particularly true given there is nothing either in the Westfall Act nor its legislative history

to lead to the conclusion that for other than removal, Congress did not desire to amend the procedure established under Federal Drivers Act. Thus the Court is respectfully urged to reverse the decision below and mandate that the District Court conduct a de novo review of the "James Bond Defense" and Attorney General's issuance of the certification of scope of employment.

ARGUMENT

PRIOR TO ORDERING THE SUBSTITUTION OF THE UNITED STATES AS A DEFENDANT FOR A FEDERAL EMPLOYEE NAMED IN A STATE-LAW TORT ACTION, THE DISTRICT COURT MUST PROVIDE AN IMPARTIAL DE NOVO REVIEW AND HEARING ON THE FACTS AND INDIVIDUAL FACTORS INVOLVED SO TO DETERMINE IF THE FEDERAL EMPLOYEES CONDUCT WAS IN FACT ACTUATED, AT LEAST IN PART, BY A PURPOSE TO SERVE THE INTEREST OF THE UNITED STATES.

This Court held unanimously in Westfall v. Erwin, 484 U.S. 292, 300, 108 S.Ct. 580, 585, 98 L.Ed.2d 619 (1988), that consistent with earlier decisions which furthered the policy of promoting effective government, absolute official immunity from state-law tort actions would be available only when the challenged conduct of federal officials is within the outer perimeter of an official's duties and is discretionary in nature. See Spalding v. Vilas 161 U.S. 483, 16 S.Ct. 631, 637, 40 L.Ed.

780 (1896); Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335 (1959).

Subsequently, Congress followed the Court's recommendation to "provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context," Westfall, 108 S.Ct. at 585; by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988, (hereafter cited as the "Westfall Act"), Pub. L. No 100-694, 102 Stat. 4563, in which absolute immunity is provided to all federal employees for any state law tort committed, so long as they were found to be acting within the scope of their employment.

Thus if the federal employee was acting within the scope of his employment the United States would be substi-

tuted as the defendant, and the suit would then proceed against the United States under the Federal Torts Claims Act (FTCA), 28 U.S.C. §§ 2671 et seq.

However, Fourth Circuit in interpreting the Westfall Act, in the instant appeal, and in Johnson v. Carter, 983 F.d 1316, 1320 (4th Cir)(en banc), cert. denied, 1320 U.S.L.W. 3244 (U.S. 1993), did so at odds with the rulings of eight other Circuit Courts of Appeals, by holding that "no discretion is given to the district court to review the Attorney General's certification [of scope of employment] made pursuant to 28 U.S.C.A. §§ 2679(d) (1), (2)" (JA-19).

Thus the Fourth Circuit holding has extended the concept of absolute immu-

nity for all federal employees,[3] beyond that previously established either for Congress in the United States Constitution under Article I, § 6, or for judges through historical precedent (". . . absolute [judicial] immunity arising out of judicial proceeding existed at least as early as 1608 in England."). Dissenting opinion Barr v. Matteo, 360 U.S. 564, 579, 79 S.Ct. 1335, 1344 (1959)).

In short, the Fourth Circuit holds that a federal employee is absolutely immune from suit in his individual ca-

[3]"Federal agency" includes the executive departments, the judicial and legislative branches, the military departments. . . . "

"Employees of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty. . . ., and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation. 28 U.S.C. § 2671.

pacity, whether or not on a temporary duty assignment or at their home station, for all activity during the twenty-four hour of the day, i.e. "James Bond Defense." (See dissenting opinion of Judge Spouse, Carter 983 F.2d at 1324).

This despite the fact that the analysis of the factors supporting the determination of "scope of employment" is not made by an impartial fact finder, but by the Attorney General, who as an appointed official of the Executive Branch is neither a disinterested party, nor independent of political and public pressure.

Fortunately with the exception of the Fourth Circuit, all other Circuit Courts that have addressed the specific question of the reviewability of a dis-

puted scope-of-employment certification issued under the 1988 amendments to 28 U.S.C. § 2679, have uniformly held them to be subject to de novo judicial review.

As the Second Circuit stated in McHugh v. University of Vermont, 966 F.2d 67, 72 (2nd Cir. 1992), "[w]e believe that the scope-of-employment certification should be reviewed de novo for purposes of substituting the United States as a defendant and precluding an action against the federal employee."

In addition to the Second Circuit, seven other Circuit Courts have held that as a rule of law the Attorney General's certification will be reviewed de novo prior to substituting the United

States as a defendant and immunizing the federal employee:[4]

o the First Circuit, see Nasuti v. Scannell, 906 F.2d 802 (1st Cir. 1990);

o the Third Circuit, see Melo v. Hafer, 912 F.2d 628 (3rd Cir. 1990), aff'd on separate grounds, __ U.S. __, 112 S.Ct. 358, 116 L.Ed.2d 301(1991);

o the Sixth Circuit, see Arbour v. Jenkins, 903 F.2d 416 (6th Cir. 1990);

o the Seventh Circuit, see Snodgrass v Jones, 957 F.2d 482 (7th Cir. 1992);

o the Eighth Circuit, see Brown v. Armstong, 949 F.2d 1007 (8th Cir. 1991);

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[4]only in Fifth and the Tenth Circuits, where the Westfall Act scope of employment certification was not a disputed issue, has it been held that substitution is automatic and mandatory upon certification, see Mitchell v. Carlson, 896 F2d 128, 136 (5th Cir. 1990), and Aviles v. Lutz, 887 F2d 1046 (10th Cir. 1989).

o the Ninth Circuit, see Meridian Logistics, Inc. v. United States, 939 F.2d 740 (9th Cir. 1991); and,

o the Eleventh Circuit, see S.J. & W Ranch, Inc. v. Lehtinen, 913 F.2d 1538 (11th Cir. 1990).

A. The right to judicial review under the Federal Drivers Act was not amended by the Westfall Act.

The interpretation by the eight Circuit Courts that have dealt with the question of the reviewability of a certification issued under the Westfall Act, holding for judicial review, is consistent with an analysis of the Westfall Act, in conjunction with preexisting statute and case law against which it was enacted.

The Westfall Act amended the 1961 amendments to the Federal Tort Claims Act, Public Law 87-258 [75 Stat

539] (1961), known as The Federal Drivers Act, 28 U.S.C. § 2679 (b)-(c), by which Congress did "provide for the defense of suits against Federal employees arising out of their operation of motor vehicles in the scope of their employment."

Under the Federal Drivers Act, "the trial judge determined the scope of employment issue as a matter of law." Petrousky v. United States, 728 F.Supp 890, 891 (N.D.N.Y., 1984).

Therefore, if the district court found that the federal driver was not acting within the scope of his employment, the United States would not be substituted, and the action would proceed against the federal employee in his individual capacity. Cronin v Hertz Corp., 818 F.2d 1064 (2nd Cir. 1987).

Furthermore, in those actions involving removal from a State court, if the district court found that the federal driver was not acting within his scope of employment the action was to be "remanded to the state court where it is to be recommended against the federal driver in his individual capacity." McGowan v. Williams, 623 F.2d 1239, 1242 (7th Cir. 1980).

The Westfall Act modified the Federal Drivers Act in several respects:

First, absolute immunity for all tort actions was granted to all officers or employees of the executive, judicial, or legislative branches of the United States. 28 U.S.C. §§ 2671 and 2679(b).

Second, 28 U.S.C. §2679(d)(3) added the provision that, if a certification is refused, would allow federal employ-

ees for the first time to petition the court in which the action is pending, state or federal, to find that they were acting within the scope of employment. But see Cronin v Hertz Corp., 818 F.2d 1064 (2nd Cir. 1987), wherein the federal courts already recognized this right of de novo review by the judiciary of the denial of certification in an action not involving removal under the Federal Drivers Act.

Furthermore, in the context of removal, under this section the Attorney General is empowered to remove the action, if in state court, to the district court upon such employee's petition. If the district court finds that the acts were not within the scope of employment, the case is to be remanded to state court.

Third, in 28 U.S.C. § 2679(d)(1), the Westfall Act extended the certification procedure to all cases, including those already in federal court.

Therefore, under the Westfall Act the Attorney General's certification serves two purposes:

First, it is the basis for removal of state court actions to federal court; and,

Second, it is the basis for the substitution of the United States as a defendant and for the resultant immunization of the federal employee.

With regard to removal, 28 U.S.C. § 2679(d)(2), amended existing law by providing that a certification "conclusively establish[es] scope of office or employment for purposes of removal."

In contrast, 28 U.S.C. § 2679(d)(1), which provides for substitution and triggers the preclusive effect of 28 U.S.C. § 2679(b) on the actions against the federal employee, contains no explicit language conferring conclusive status upon the Attorney General's certification. Thus because Congress did not amend the procedures under the Federal Drivers Act, the right to judicial review of the certification was not amended.

This interpretation of the statute not conferring automatic conclusive status upon the Attorney General certification is consistent with the holding in Cronin v Hertz Corp., 818 F.2d 1064 (2nd Cir. 1987), which was the only case located that involved diversity and did not involve removal. There the lower

court undertook judicial review of the denial of certification, based on the question present, which was the vicarious liability of the United States for an automobile accident caused by a civilian employee on temporary assignment (TDY) away from home.[3]

In Cronin, as in the instant appeal the accident occurred late at night after working hours and after the federal employee had a number of alcoholic drinks, but unlike in the instant appeal where the lower courts neither held a hearing nor took notice that Mr. Lamagno

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[3]In the action the civilian federal employee was permanently assigned in Hawaii, but was TDY, taking a training course in Groton, Conn. While on TDY, the federal employee used a Hertz rental car to go bar hopping, and upon returning to his hotel collided with, and killed a motorcyclist. The consevatrix of the estate sued Hertz, Hertz impleaded the federal employee living in Hawaii, the federal employee claimed he was acting within the scope of his employment, and therefore the United States was vicariously liable.

was driving away from his hotel in the company of a female companion not in federal employment, in Cronin, the District Court held a hearing wherein it was established that the employee was on his way back alone to lodging, which was provided by the Government.

Since it was not a removal action, the District Court had no statutory authority to hold a hearing and review the scope of employment issue, but the court did so, and found that the federal employee was not acting within his scope of employment.

On appeal the Second Circuit affirmed, stated that because it could not accept, the "argument that persons on temporary duty are at all times acting solely for the benefit of the employer's benefit, and are always with the scope

of employment. Rather, we look to the facts and to the individual factors involved. . . [Because an] employer who sends an employee away for temporary duty does not automatically become an insurer for all that the employee may do while he or she is away from home." Cronin 818 at 1067.

In Cronin, the "James Bond Defense," was emphatically rejected.

Therefore, the question for the circuit court, in this pre-Westfall Act case, was not whether it had a right to review the denial of the certification, but was whether the federal employee's conduct was "actuated, at least in part, by a purpose to serve the master. Restatement (Second) of Agency § 228(1)-(c)" Cronin 818 at 1067.

Regarding the factors to consider in a case involving an intoxicated federal employee, the circuit court recognized that some acts of a federal employee "even when committed in a state of intoxication may nevertheless be said to be actuated by the interests of the employer." Cronin 818 at 1068.

In its analysis the circuit court considered in those cases where the motivation of the federal employee is difficult to discern, that it would "look next to see whether the risk of this type of accident was foreseeability in such a sense as to make it fair to charge the Government for responsibility" Cronin 818 at 1068.

However, the circuit court stated "that what is reasonable foreseeable in the context of respondent superior is

quite a different thing from the foreseeable unreasonable risk of harm that spells negligence. . . In this sense `fairness probably cannot be altogether divorced from some kind of foreseeability.' We should, however, look to the `broadscope of a whole enterprise,' including both its `more or less inevitable toll' and the harm that is likely to flow from the employer's activity despite the reasonable precautions that might be taken." (citation omitted) Cronin 818 at 1068.

Consequently, under the Federal Drivers Act, judicial review of the certification was the norm, even in non-removal cases.

B. The legislative history of the Westfall Act support continued judicial review of the certification.

As further support of the continued right to judicial review under the Westfall Act, we turn to its legislative history, wherein during the hearing before the House Subcommittee on Administrative Law and Government Relations of the Committee on the Judiciary, Subcommittee Chair Frank, who was the Westfall Act's sponsor, stated that the Act was,

> "not going to void the [certification] litigation. It seems to me that certification is a weapon against the employee, not against the plaintiff, because the plaintiff would still have the right to contest the certification if they [sic] thought the Attorney General were [sic] certifying without justification." Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the

Judiciary, 100th Cong., 2d Sess. 60, 128 (April 14, 1988).

Furthermore, even the Department of Justice representative, Deputy Assistant Attorney General Robert Willmore, who appeared at the Congressional hearing confirmed the reviewability of the certification, stating that "Chairman Frank is correct that a plaintiff can challenge that certification. So that would be reviewable by a court at some point, probably by a Federal District Court." Legislation to Amend the Federal Tort Claims Act: Hearing, at 133.

Thus a review of the legislative history, and the Westfall Act itself, fails to present any evidence that Congress intended to eliminate judicial review of the determination of the scope of employment issue, except with regard to removal.

Indeed, such an elimination of judicial review would amount to a violation of the Injured Parties right to due process and equal protection of the laws, since it denies them the right to be heard on the issue of their challenge to the scope of employment, and thereby deprives them of the right to recovery for loss of property and for personal injuries. See St Joseph Stock Yards Co. v United States, 298 U.S. 38, 56 S.Ct. 720, 726 (1936).

This deprivation of due process and equal protection of the laws is obvious, and particularly onerous, since the Westfall Act does now empower the federal employees to challenge a refusal by an Attorney General to certify scope of employment. See 28 U.S.C. § 2679(d)(3).

In the instant action, the DEA raise only the "James Bond Defense," that is Mr. Lamagno as a Special Agent is on duty twenty-four hours a day, (4th Cir. Ct Appeal, Brief of Appellees, p. 4 and p 20). This as noted was rejected by the Second Circuit in Cronin.

Because it has been admitted that Mr. Lamagno was driving away from his hotel, recklessly and under the influence of alcohol, late at nigh after normal office hours in the company of an unidentified woman, and was charged with a violation of the provisions of the Colombian traffic Code, the United States cannot be automatically substituted as the defendant, and thereby causing Mr. Lamagno to be immunize from suit in his individual capacity.

In fact, by these very admissions, the Injured Parties have more than met their burden of presenting "specific facts rebutting the government's scope of employment certification" Brown v Armstrong, 949 F.2d 1007 at p. 1012 (8th Cir. 1991); Hamrick v. Franklin, 931 F.2d 1209 at 1211 (7th Cir. 1991), and the district court, in accordance with the procedure established under the Federal Drivers Act, was required to conduct at least limited judicial hearing to review the Attorney General's scope-of-employment certification before substituting the United States as defendant.

CONCLUSION

For the reasons given herein, the Court is respectfully requested to reverse the decision of the United States Court of Appeals for the Fourth Circuit, and remand the action to the District Court for a de novo review of the evidence to determine whether Mr. Lamagno is entitled to the Attorney General's certification under the Westfall Act, 28 U.S.C. § 2679(d).

Respectfully submitted,

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December 13, 1994